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No. 83-1085

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY, PETITIONER

v.

MELAMINE CHEMICALS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The government antitrust consent decree here at issue required the petitioner, a producer of melamine, to purchase from other producers a substantial amount of melamine each year, but provided that after ten years the petitioner could obtain relief from the purchase requirement, notwithstanding the objection of the government, by showing that such relief would not substantially "lessen competition or tend to create a monopoly in any line of commerce * * *." In this case, the petitioner did not seek relief over the opposition of the government; instead, both parties to the decree sought termination of the purchase requirement. In these circumstances, the question presented is:

Whether the court of appeals erred in applying the standard provided in the decree for situations where the defendant sought relief over the government's objection, rather than deferring to the parties' interpretation of the terms of the decree and to the reasoned judgment of the United States that termination of the decree would be in the public interest as defined by the antitrust laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 719 F.2d 558. The opinion of the district court terminating the consent decree (Pet. App. A25-A46) is reported at 556 F. Supp. 361. The consent decree at issue here (Pet. App. A68-A86) was entered in August 1964 and is published at 1964 Trade Cas. (CCH) para. 71,166.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1983. The petition for a writ of certiorari was filed on January 3, 1984.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The United States has been made a respondent in this case pursuant to Rule 19.6 of the Rules of this Court (see Pet. i).

STATEMENT

1. In 1960 the United States filed a complaint (Pet. App. A87-A99) against petitioner American Cyanamid Company (Cyanamid) alleging that it had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, by participating in an international cartel that controlled the production of melamine, a substance used in the manufacture of high-pressure laminates and other plastic products. The complaint also alleged that Cyanamid's 1956 acquisition of Formica Company, a consumer of melamine, had violated Section 7 of the Clayton Act, 15 U.S.C. 18.

The lawsuit was settled in 1964 with the entry of a consent decree (Pet. App. A68-A86). Many of the decree's provisions have now expired or have been fully satisfied (*id.* at A7). The only provision of the decree now at issue is Section XI, which directs Cyanamid (*id.* at A81):

> to purchase annually from other producers of melamine (with the preference to United States producers) an amount of melamine for use by Cyanamid in the production of laminates in the United States * * *.

This provision, as a practical matter, requires Cyanamid to purchase large amounts of melamine from its chief competitor, respondent Melamine Chemicals, Inc. (MCI) (*id.* at A32). Section XI further provides, however, (*id.* at A81):

> that at any time after ten (10) years from [August 4, 1964] Cyanamid may petition to [the district] Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of [the] Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

2. By 1981, the melamine industry had undergone major changes, including two of prime import to this case. First, the traditional melamine manufacturing process—which Cyanamid and its co-conspirators controlled in 1964—has been completely displaced by a new process that is owned and licensed by a firm that was not involved in the pre-1964 cartel (see Pet. App. A7). Second, Cyanamid is no longer the sole source of melamine for domestic users; today, there are two large domestic manufacturers of melamine—Cyanamid and MCI—and numerous foreign manufacturers that sell melamine in the United States (see *id.* at A36, A40).

3. Citing these changed economic circumstances, Cyanamid requested that the United States consent to termination of all provisions of the final judgment remaining in effect. In particular, Cyanamid argued that the melamine purchase provision now imposed upon it the anticompetitive requirement of subsidizing its strongest competitor, MCI. After a lengthy investigation by the Antitrust Division, the United States tentatively concluded that the decree had become anticompetitive and should be terminated.

On August 5, 1982, Cyanamid moved in the district court for termination of the decree, and the United States filed a memorandum that explained why it had tentatively consented to termination (*id.* at A55-A67). Following a 60-day period for public comment, the United States filed a detailed response to the three comments that had been submitted, and informed the district court that it had come to the firm conclusion that the public interest required termination of the decree (C.A. App. 191-205).

MCI and another company were allowed to intervene in the district court, over the objections of the government and Cyanamid (Pet. App. A47-A54). MCI argued that Section XI of the decree could be terminated, by its terms, only if

Cyanamid proved that termination would not "substantially * * * lessen competition or tend to create a monopoly"—the standard set forth in Section 7 of the Clayton Act. MCI contended also that Cyanamid could not discharge that burden.

The district court ruled that the decree had become anticompetitive and should be terminated (Pet. App. A25-A46). The court rejected intervenor MCI's attempt to apply the Clayton Act standard to situations other than unilateral efforts at modification. Since both the government and Cyanamid had consented to termination, the court held instead (*id.* at A34) that the appropriate legal standard for approving termination was whether such a result was "in the public interest," as expressed in the competitive policy articulated in the antitrust laws. After a detailed discussion of the evidence and the contentions of the parties, the district court found that (1) significant changes had occurred in the melamine industry since the decree was entered (*id.* at A31-A33); (2) as a result of those changes the melamine purchase provision had become anticompetitive on balance under both the "public interest" and the Clayton Act standards[2] (see *id.* at A35-A40); and (3) the arguments made by MCI and others concerning alleged adverse consequences of termination were unfounded (*ibid.*). Finally, the district court concluded that termination was in the public interest and should take effect immediately (*id.* at A39-A45).

4. The court of appeals reversed. It concluded that both the language of Section XI of the decree and the "purpose of the provision in the overall context of the judgment" (Pet. App. A14) established that the appropriate standard for termination was not the usual public interest standard, but

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[2]Although the district court had ruled that the Clayton Act standard was not applicable, its analysis, in effect, included the factors that would be relevant to a Section 7 case.

the "higher" Clayton Act standard set forth in Section XI—regardless of the government's consent to termination (*id.* at A12-A17). The court emphasized that "[n]o provision has been made to apply a different standard where the government joins with Cyanamid in moving to terminate the consent decree" (*id.* at A15).

The court of appeals then concluded (Pet. App. A20-A21) that the district court had given inadequate consideration to Section XI's special Clayton Act standard because the lower court's discussion had fallen short of the "standard framework of analysis" required in Section 7 merger cases by *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and *Fruehauf Corp.* v. *FTC*, 603 F.2d 345 (2d Cir. 1979). The court remanded the case to the district court "to apply the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe*, *Fruehauf*, and other applicable cases, and to make findings of fact as to the current state of the melamine market and the market for products that contain melamine" (Pet. App. A21).[3]

DISCUSSION

The court of appeals erred in holding that the standard provided in Section XI of the decree applies notwithstanding the government's consent to termination of the judgment, and in rejecting as inadequate the district court's analysis of the competitive consequences of termination. While the judgement below is clearly incorrect, the court of appeals' decision presents no sharply defined legal issue of sufficient importance to warrant plenary review by this Court, especially in the present interlocutory posture of the

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[3]The court of appeals also ruled that if on remand the district court should find that termination was appropriate under the special Clayton Act standard, it "should exercise its equitable power to determine an appropriate duration" for a gradual phase-out of the melamine purchase provision. Pet. App. A21.

case. The decision construes specific language that appears in only a few government antitrust consent decrees, and rests upon the specific nature of the district court's findings in this case. Moreover, the decision does not directly conflict with any decision of this Court or any other court of appeals.

1. The Executive Branch bears the primary responsibility for "protecting the public interest" under the antitrust laws. *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954). Accordingly, it possesses the concomitant prosecutorial discretion to institute or to refrain from instituting an enforcement action. See, *e.g.*, *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). Once it files an antitrust suit the government may settle the suit by consent decree, so long as the settlement serves the "public interest."[4] The judicial "public interest" determination takes its meaning from the statutes underlying the litigation, *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976); in this case, the antitrust laws are the relevant legislation, and "the policy unequivocally laid down by [those statutes] is competition." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958).

Where a defendant moves to modify or terminate an antitrust decree over the government's objection, the defendant must prove that any post-decree changes in the industry

> are so important that [the anticompetitive] dangers, once substantial, have become attenuated to a shadow * * *. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [a court] to change what was decreed * * *.

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[4] *E.g.*, 15 U.S.C. 16(e); *United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, No. 82-952 (Feb. 28, 1983).

United States v. *Swift & Co.*, 286 U.S. 106, 119 (1932) (*Swift*). This strict standard is appropriate and necessary in order to protect the government from having to prove anew its original case, years after entry of a decree, each time a defendant moves to modify or terminate an antitrust judgment. If the rule were otherwise, private parties, and not the government, would have control over the use of the public's resources for antitrust enforcement.

Where the government has consented to motions to modify or terminate consent decrees, however, the courts have judged the reasonableness of such actions under the same "public interest" standard that is applied when a decree is originally proposed.[5] The courts have not—except in this case—required a determination whether the allegations of the original complaint continue to be valid at the time of the motion for termination. Instead, where the United States has consented to termination and offered a reasoned explanation why such a course would vindicate the public interest in free competition, and there is no showing of government bad faith or malfeasance, courts properly defer to the government's judgment. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981).[6]

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[5] *E.g.*, *United States* v. *Swift & Co.*, 1975-1 Trade Cas. (CCH) para. 60,201, at 65,702 (N.D. Ill. 1975); *United States* v. *General Electric Co.*, 1977-2 Trade Cas. (CCH) para. 61,659, at 72,717 (E.D. Pa. 1977).

[6] Cf. *United States* v. *Borden Co.*, 347 U.S. at 519 ("[i]t is • • • clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry"); *Buckeye Co.* v. *Hocking Valley Co.*, 269 U.S. 42, 48-49 (1925). Over the years, federal courts have approved hundreds of consent orders modifying or terminating government antitrust decrees.

In this case, the court of appeals not only failed to defer to the government's judgment that termination of the decree would be in the public interest, but it also imputed to the government and Cyanamid a reading of Section XI that is inconsistent with rational decision-making by the parties at the time the decree was entered. Neither party would have imposed on itself the unnecessary burden of proving, at a later date, that a violation of the Clayton Act would *not* result from an action its adversary was willing to accept. Given the strictness of the *Swift* standard for unilateral modification of a decree by an antitrust defendant, the purpose of the Clayton Act language in Section XI of the decree is clear, as the district court found (Pet. App. A34). The insertion of that special standard simply permitted Cyanamid to obtain modification of the melamine purchase provision, *over the government's objection*, pursuant to a less onerous standard than *Swift* otherwise would have required. The court of appeals thus misinterpreted Section XI's purpose and intended effect; the Section XI standard is simply not applicable where both parties agree to change the decree.

2. If we shared petitioner's concern that the court of appeals' erroneous decision might have broad precedential effect (Pet. 9-13), we would urge this Court to grant the petition.[7] If termination of an antitrust decree by mutual consent of the parties were indeed generally to be conditioned on proof that the allegations of the original complaint

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[7]Petitioner also argues that the Constitution precludes judicial review of the parties' agreement to terminate the decree because (1) there is no genuine case or controversy (Pet. 14-16); and (2) such review intrudes upon the constitutional authority of the Executive Branch to control its own lawsuits, which includes the power to dismiss them (Pet. 18-19). Considering, however, that petitioner did not raise these arguments below, and that the order of the court of appeals is not a final judgment, the United States believes that these contentions do not warrant this Court's review at this time.

were no longer true, fewer outdated decrees would be terminated; as a result, competition would be adversely affected and antitrust defendants would be less willing to enter into consent decrees in the first place.

In our view, however, petitioner overstates the effect of the court of appeals' decision, which is limited to the unusual facts of this case. The rationale of the decision is inseparable from the special standard contained in the Cyanamid decree: as the court itself saw the case, the issue was "whether the district court erred in applying a 'public interest' standard to decide whether to terminate Part XI of the decree which provided its own higher standard, simply because the government consented to the termination" (Pet. App. A3). Thus, the court of appeals explicitly based its decision on the particular, and unusual, language of this decree (see *id.* at A12-A17).

There are approximately 1300 antitrust consent decrees now in effect.[8] The Antitrust Division has recently reviewed more than 350 of these decrees and has found fewer than six that contain special termination standards similar to the one in this case. Accordingly, the court of appeals' narrowly-based decision should not have a significant effect upon the government's authority to secure the termination of antitrust decrees when and if they become anticompetitive.[9]

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[8]See Statement of William F. Baxter Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 98th Cong. 1st Sess. Mar. 10, 1983, p. 15.

[9]Indeed, four government antitrust decrees have been terminated by consent since the court of appeals' decision—three of them over substantial opposition by third parties—on the basis of the usual "public interest" standard. *United States* v. *Rohm & Haas Co.*, Civ. No. 9068 (E.D. Pa. Dec. 21, 1983); *United States* v. *Safeway Stores, Inc.*, Civ. No. CA4-3173 (N.D. Tex. Nov. 30, 1983); *United States* v. *American Can Co.*, Trade Reg. Rep. (CCH) para. 65,773 (N.D. Cal. Nov. 1, 1983); *United States* v. *Continental Can Co.*, Civ. No. 26346-WWS (N.D. Cal. Oct. 31, 1983). None of these decrees contained a special termination standard.

And while the continuation of this decree will have an altogether unjustified anticompetitive effect on the melamine industry, the significance of that effect is not great enough by itself to warrant this Court's plenary consideration — particularly in light of the possibility that the proceedings on remand may still result in termination of this decree.

CONCLUSION

The petition for a writ of certiorari should be denied.[10]

Respectfully submitted.

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[10]In view of the clarity of the court of appeals' error and the anticompetitive nature of the result, the Court may wish to consider summary reversal. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).